On the contrary, the right to sue the guarantor without resorting to the securities is clearly recognised by Lord Selborne, and by Lord Blackburn, in the Scottish case of *Ewart* v. *Latta.*[4] Lord Westbury, C. says:

'Until the debtor has discharged himself of his liability, until he has fulfilled his own contract, he has no right to dictate any terms, to prescribe any duty, or to make any demand on his creditor. The creditor must be left in possession of the whole of the remedies which the original contract gave him, and he must be left unfettered and at liberty to exhaust those remedies, and he cannot be required to put any limitation upon the course of legal action given by him by his contract by any person who is still his debtor, except upon the terms of that debt being completely satisfied.'

Further on he says:

'The same principle prevails also in the law of England, that if a debt be due from A and B be the surety, B has no right in respect of that debt as against the creditor unless he undertakes to pay and actually does discharge it.' "

Halsbury's Laws of England, Volume 20, 4th edition, paragraph 159 at page 87 states:

"... It is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for, nor is it necessary for the creditor to prosecute the principal debtor for any offence he may have committed unless this is rendered essential by the terms of the guarantee, nor to resort to securities for the guaranteed debt received by the creditor from the principal debtor, although, in certain special circumstances, it may be necessary for the creditor, before having recourse to the surety, to seek indemnity from a third person."

By making the order of stay the learned Judge appeared to think that the creditor should go against the principal debtor before going after the surety. *Halsbury's* Laws of England, Volume 20, 4th edition, paragraph 186 at page 101 under the heading "Surety's right to compel creditor to collect debt" provides:

"After the guaranteed debt has become due, and before he has been asked to pay it, the surety may require the creditor to call upon the principal debtor to pay off the debt. In the absence of agreement the creditor is, however, not bound to sue the principal debtor before suing the surety. Moreover the surety, even where he deposits the amount of the guaranteed debt, cannot without such agreement compel the creditor to proceed against the principal debtor unless he undertakes to indemnify the creditor for the risk, delay and expense which he thereby incurs, and, apparently, satisfies him that the principal debtor is solvent."

We appreciate the good intention of the learned Judge in making the order of stay. Whatever the learned Judge may think about the matter, we do not think, in the circumstances, he has the jurisdiction either to dismiss or to stay the creditor's petition.

Order accordingly.

Solicitors: *Clough Thuraisingam, Sivasubramaniam & Ramdas; Peter Lai & Wong.*

ENESTY SDN. BHD. v. TRANSPORT WORKERS UNION & ANOR.

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Mohamed Azmi S.C.JJ.) February 7 & June 28, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 200 of 1984]

Industrial Law – Claim for recognition of trade union – Matter pending before Minister – Dismissal of workers by employer – Strike notice issued by Union – Dispute referred to Industrial Court – Industrial Court holding that workmen were dismissed without just cause or excuse – Employer ordered to pay compensation – Application for order of certiorari to quash award – Alleged error of jurisdiction in hearing reference on its merits – Whether issuance of strike notice constitutes a strike – Whether error of law constitutes acting without jurisdiction or in excess of jurisdiction – Industrial Relations Act, 1967, ss. 2, 9, 10, 29(3), 33B, 43 & 45.

Administrative Law – Application for order of certiorari to grant award of Industrial Court - Alleged error of jurisdiction in hearing reference – Whether issuance of strike notice constitutes a strike – Whether error of law constitutes acting without jurisdiction or in excess of jurisdiction – Judicial Review – Findings of fact – No jurisdiction to interfere – Courts of Judicature Act 1964, s. 25(2) – Industrial Relations Act 1967, ss. 29(3) & 33B.

In this case the workers employed by the appellant and who were members of the respondent union had submitted a claim for recognition. The appellant did not give recognition and the trade union reported the matter to the Minister. While the matter was still pending the appellant dismissed 38 workers. The trade union also issue a strike notice. The dispute was referred to the Industrial Court. The appellant claimed that they were justified in dismissing the workmen as the action of the union constituted a strike. The Industrial Court held that the strike notice did not constitute a strike and it made an award that the workmen were dismissed without just cause and excuse. The appellant was ordered to pay compensation to the dismissed workers. The appellant applied for an order of certiorari to quash the award of the Industrial Court. The motion was dismissed in the High Court and the appellant appealed.

Held: the Industrial Court and the High Court were correct in law in their conclusion that the word "strike" for the purpose of section 10(1) of the Industrial Relations Act, 1967, does not include issuance of a strike notice. The

Industrial Court in basing its award on that valid conclusion had not therefore committed any error of law and as such cannot be said to have exceeding its jurisdiction. The learned Judge in the High Court was accordingly correct in rejecting the motion.

Semble: Perhaps the time will come for this Court to consider the views expressed by Lord Diplock in the House of Lords in *Re Racal Communications Ltd.* and thereby open the way for the acceptance of Lord Denning's suggestion in *Pearlman* v. *Harrow School* in discarding the distinction between an error of law which affected jurisdiction and one which did not. There is no degree of nullity and if there is an error of law on which the Industrial Court's award depends the remedy of *certiorari* should not be excluded by section 33B(1) of the Industrial Relations Act, 1967.

Cases referred to:

(1) *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147, 171.
(2) *Assunta Hospital* v. *Dr. A. Dutt* [1981] 1 M.L.J. 115.
(3) *Dr. A. Dutt* v. *Assunta Hospital* [1981] 1 M.L.J. 304.
(4) *Pearlman* v. *Harrow School* [1979] 1 Q.B. 56.
(5) *Inchcape Malaysia Holdings Bhd.* v. *R.B Gray & Anor.* [1985] 2 M.L.J. 297.
(6) *South East Asia Five Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union* [1980] 2 M.L.J. 165, 166, 167.
(7) *In re Racal Communications Ltd.* [1980] 3 W.L.R. 181.
(8) *O'Reilly* v. *Mackman* [1983] 2 A.C. 237; [1982] 3 All E.R. 1124.

SUPREME COURT.

Miss Ambiga Sreenevasan for the appellant.

K.P. Gengadharan (*K. Chandra* with him) for the respondent.

Cur. Adv. Vult.

Mohamed Azmi S.C.J. (delivering the Judgment of the Court) : By Notice of Motion dated December 24, 1982, the appellant company (hereinafter referred to as "Enesty") applied firstly for an Order of *Certiorari* to remove into the High Court at Kuala Lumpur for the purpose of it being quashed Industrial Court Award No. 180/82 handed down on September 23, 1982 under which Enesty was ordered to pay the sum of $298,761.07 as compensation for dismissing without just cause or excuse 38 workmen who are members of the Transport Workers Union – the first respondent; and secondly for an Order of Mandamus in respect of Award No. 209/82 requiring the Industrial Court to refer to the High Court under section 33A Industrial Relations Act, 1967 five questions of law arising out of Award No. 180/82. The Motion was dismissed by the High Court on July 20, 1984, and hence the present appeal, but before us the argument is confined only to the first Award No. 180/82.

The facts of the case may be summarised as follows. Enesty was a party to a contract with the New Straits Times Press (NSTP in short) under which Enesty was to provide lorries and drivers for delivery of newspaper published by NSTP. The workers employed by Enesty who are members of the Transport Workers Union (hereinafter referred to as "the Union") had submitted a claim for recognition under section 9 of the Industrial Relations Act 1967. Before recognising the Union, Enesty wanted the Director-General of Industrial Relations to carry out certain investigation. In particular, Enesty was not satisfied as to the percentage of worker which the Union had claimed to be its members. Another reason given by Enesty was that a similar claim had been made by another trade union, *viz.*, the National Union of Newspaper Workers (NUNW) but nothing turned on the second reason when NUNW agreed that the union should represent the thirty-eight workers in the application for recognition.

At this stage it should be noted that the dispute over recognition to enable the union to commence negotiation for collective bargaining of terms and conditions of employment and the eventual dismissal of the workers took place before the Industrial Relations Act, 1967 was amended by Act A484 which came into force on May 30, 1980 except for section 9 amendment which was made effective only on September 15, 1980 *vide* P.U(B) 452/80. In the circumstances, reference will be made to the provisions of the Act prior to the 1980 amendments unless otherwise stated. Under section 9(2), a trade union of workmen may serve on an employer in writing a claim for recognition. Upon being so served, section 9(3) provides that the employer shall within 21 days after the service, either accord recognition or if recognition is not accorded notify the trade union concerned in writing the grounds for refusing recognition. Upon receipt of a notification under section 9(3) or where an employer has failed to comply with section 9(3), the trade union may report the matter to the Minister pursuant to section 9(4). By virtue of section 9(5) where the Minister decides, after making such inquiries as may be necessary that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer as from the date of service of the Minister's decision on the employer. Such decision of

the Minister shall be final and shall not be questioned in any court. Section 9(6) then provides that where any step taken or any inquiry made in respect of a report made by the trade union to the Minister under section 9(4) is taken or made by or under the direction of the Director General, it shall be deemed to be a step taken or an inquiry made by the Minister under section 9(5). During the pendency of the proceedings for claim for recognition under section 9, the Act imposes a prohibition against any strike by the workers or dismissal of workers by the employer. Section 10 provides as follows:

"(1) No workman shall go on strike for whatever reason, during the pendency of proceedings under section 9 or after the Minister has decided that the trade union should not be accorded recognition by the employer of such workman.

(2) An employer shall not dismiss a workman once a trade union of workmen has served in writing on the employer or a trade union of employers to which the employer belongs a claim for recognition in respect of the workman or class of workmen:

Provided that a dismissal may be effected on disciplinary grounds and that this restriction shall no longer apply once the Minister has made a decision on the claim."

In this case when Enesty failed to give voluntary recognition, the union had reported the matter to the Minister under section 9(4). It is common ground that when the thirty-eight workers were dismissed by Enesty, (i) proceedings for recognition under section 9 were still pending, and (ii) the Minister had yet to make a decision whether Enesty should accord recognition to the union. In the circumstances, it would appear that the dismissal of the workers had contravened the provision of section 10(2). However, it is also not in dispute that during the pendency of proceedings for recognition, the union had, out of desperation, issued a strike notice, but what becomes material is the real reason for Enesty dismissing the thirty-eight workers by their letter dated February 27, 1980, the relevant part of the English translation of which reads:

"You are hereby informed that the New Straits Times Press (M) Berhad have terminated their contract to deliver newspapers in which we are the main contractor.

We regret to inform you that due to the termination of this contract, there is a redundancy in this firm. It has been the intention of this firm to exercise the policy of termination of services 'last in first out'. However, as attendants are not required, all attendants are declared redundant. Therefore, this firm will pay one month salary in lieu of notice commencing from March 1, 1980.

This payment will be made after obtaining the confirmation from the Income Tax Department and after deducting your debts to this company. You are requested to return all company's property held by you such as the uniform, name tag etc.

Thank you.

Yours faithfully,

Sgd. Zainol Haris bin Ismail
General Manager,
ENESTY SDN. Bhd."

Although the letter specifically gave "redundancy" as the ground for dismissal, Enesty somehow managed to transform it by way of preliminary objection before the Industrial Court, to the issuance of the notice of strike by the union as the actual ground for dismissal of the workers. Thus, both here and in the High Court, the argument advanced by Enesty in justifying the dismissal of the workmen is centred on the interpretation of the word "strike" as contained in section 10(1) of the Industrial Relations Act having regard to its definition in section 2. It is their argument that by issuing the strike notice, such action constituted a strike, and as such the strike should be deemed to be illegal under section 45(1) (a) and the workers had thereby violated the prohibition imposed by section 10(1). Enesty accordingly argues that they were legally justified in dismissing them on disciplinary ground under the proviso to section 10(2) read with section 45(1) (a) which provides:

"A strike or a lock-out *shall be deemed to be illegal if it is declared* or commenced or continued in contravention of section 43 or section 44 or of any provision of any other written law" (emphasis supplied).

The Industrial Court rejected the interpretation attached by Enesty to the word "strike" in section 10(1). At pages 11 and 12 of its award, the Court came to the following findings:

"It is further argued on behalf of the Company that the serving of a strike notice by the Union upon the Company fell within the definition of 'Strike' under section 2 of the Industrial Relations Act, 1967 and therefore it was rendered illegal by virtue of section 10(1) of the said Act. It is argued that the strike notice was itself an act which was intended to result in any cessation of or dilatoriness in the performance or execution of the whole or any part of the duties connected with the employment. So it was the contention of the Company that the Union had violated section 10(1) of the Act as the notice of strike had been issued while recognition was pending under section 9 of the Act.

It is appropriate at this point to consider section 43(1) of the Act which says:

"No workman in any essential service *shall go on strike* –

(a) without giving to the employer *notice of strike*, within forty-two days before striking;

(b) within twenty-one days of giving such *notice*; or

(c) before the expiry of the date of strike specified *in any such notice* aforesaid.

Here the words 'go on strike' are distinguished from 'notice of strike'. They are separately identified. The word 'strike' indicates the actual cessation of work or refusal to go on working unless the employer accedes to some demand while 'notice of strike' is merely an intimation or warning of the cessation, or the refusal to go on working unless the employer accedes to some demand.

It is therefore incorrect for the Company to say that the strike notice given on February 11, 1980 stating that the employees would go on strike on or before February 27, 1980 was illegal as it violated Section 10(1) of the Act. Section 10(1) refers to 'going on strike' but not a 'notice of strike'. This Court finds that the Union has not violated section 10(1) of the Industrial Relations Act, 1967 by the mere issuing of the notice of strike.

On the contrary one would have thought that the Company had committed a breach of section 10(2) of the Act by declaring a lock-out or terminating the services of the workmen when the Union's claim for recognition under section 9(2) of the Act was still pending and unresolved.

Apart from its interpretation of the word "strike" in section 10(1), the Industrial Court also made various findings of fact in the award to show that the dismissal of the thirty-eight workmen was without just cause or excuse. In particular it was the unanimous conclusion of the court that Enesty were dragging their feet on the union application for recognition and that they were not *bona fide* in their conduct during the negotiation. The Industrial Court was of the view that the termination of contract between Enesty and NSTP referred to in their letter of dismissal was a concerted device by Enesty jointly with NSTP to deprive the workers of their rights. It also rejected Enesty's contention that the reason for termination of the Agreement by NSTP was caused by the union's issuance of the strike notice. In our view, the High Court has no jurisdiction under section 25(2) of the Courts of Judicature Act, 1964 to interfere with these findings of fact reached by the Industrial Court on the ground that the decision is erroneous. The learned Judge was therefore right in treating them as such. The High Court agreed with tribunal's interpretation of the word "strike" and the learned Judge dealt with the matter in his judgment as follows:-

"The thrust of the arguments put forward by Counsel for the Applicant is that the definition of 'strike' in section 2 of the Industrial Relations Act, 1967 covered the act of the Union in sending the strike notice because the definition comprising the words 'includes any act or omission . . . which is intended to or does result in' embraces both the intention to stop work and the actual stopping of work. That being the case the issuance of the strike notice was tantamount to going on strike because by virtue of the provisions of section 45(1)(a) and of section 10 the strike notice was a declaration of intention to go on strike which was illegal and punishable under section 46 thus amounting to misconduct for which the Applicant was entitled to terminate the contract of employment. It was further contended that the Industrial Court's reference to Section 43 for the definition of the word 'strike' was irrelevant and wrong as that section related to essential services. I do not accept this argument because in my view the Industrial Court was acting according to law in looking at other provisions of the Act apart from the definition section and section 10 to ascertain the true meaning to be attributed to the word 'strike' by the legislature. I cannot see how the Industrial Court applied the wrong law and thus committed an error of jurisdiction as alleged. If there had been any error at all it would, in my view, have been merely an error of law by misinterpretation within jurisdiction and I would accordingly dismiss the Applicant's application for the first award to be quashed."

In our view, both the Industrial Court and the High Court erred in law by taking into account section 43(1) in construing the word "strike" in section 10(1). The provision of section 43(1) cannot possibly apply as we are not dealing with workmen in essential services. Be that as it may, we shall consider later whether the Industrial Court's interpretation can be supported on other grounds.

Under the Industrial Relations Act, 1967, a dispute on jurisdiction can occur at two stages in proceedings before the Industrial Court. The first is at the initial stage affecting the hearing of the reference or complaint itself when reference is made by the Minister under sections 20(3), 26(1) or when a complaint is made under section 56(1); and second is at the final stage affecting the award. In this context, it is appropriate to distinguish the two jurisdiction exercisable by the Industrial Court as jurisdiction to hear the reference, *i.e.*, jurisdiction to enter on an inquiry as opposed to jurisdiction to hear the reference on its merits which in effect is jurisdiction to make a particular order, decision or award. As stated by Lord Reid in *Anisminic Ltd.* v. *Foreign Compensation Commission*[1] at page 171, "But there are many cases where, although

the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity." The Federal Court had recognised this distinction in dealing with the matter in two separate appeals arising from the case of Dr. A. Dutt. In the first appeal – *Assunta Hospital* v. *Dr. A. Dutt*[2] – in upholding the decision of the High Court to hear a reference made by the Minister. This is the "jurisdiction in the narrow and original sense" referred to by Lord Reid at page 171 in *Anisminic's* case, *i.e.*, narrow and original sense of the tribunal being entitled to enter into the inquiry in question. In delivering the unanimous judgment of the court, Chang Min Tat F.J. held at page 116:

"But there can be, on a proper construction of this section, no doubt whatsoever that it would be a dereliction of duty to renounce the jurisdiction to hear the reference. In the exercise of its jurisdiction in a reference under section 20(3), the court has a duty to come to a first finding whether or not the claimant was or was not a workman within the definition of a workman in the Act, and secondly whether or not the workman has been dismissed without just cause or excuse."

In our view a reference by the Minister under section 20 or section 26 of the Act, even if construed as a purely administrative Act as distinguished from a quasi-judicial act in exercising a statutory discretion, is a prerequisite to the Industrial Court's assumption of jurisdiction to hear the reference and without which any inquiry attempted by the tribunal to hear a dispute referred by an aggrieved party would be struck down as null and void. In the second appeal of *Dr. A. Dutt* v. *Asunta Hospital,*[3] the Federal Court after holding in the earlier appeal that the Industrial Court had jurisdiction to hear the reference, proceeded to consider whether there was any error in jurisdiction in the award made by the tribunal. This is the jurisdiction in the wider sense referred to by Geoffrey Lane L.J. when he said at page 74 in *Pearlman* v. *Harrow School:*[4]

"jurisdiction in this sense has a wide meaning. It includes any case where the apparent determination of the tribunal turns out on examination to be a nullity, because it cannot properly be called a determination at all."

It set aside the decision of the High Court in quashing the award of the Industrial Court on the ground that the tribunal had not committed any error of law or fact in arriving at its conclusion. The Federal Court was careful to use the words "jurisdiction to hear the case" and "jurisdiction to hear the reference". In a recent appeal, this Court has also recognised this distinction when Wan Suleiman S.C.J. referred to it as (1) jurisdiction to decide the action on its merit; and (2) jurisdiction to decide whether the court has jurisdiction to decide the action on its merits (see *Inchcape Malaysia Holdings Bhd.* v. *R.B. Gray & Anor.*[5] Thus merely because the Industrial Court has been proven to have jurisdiction to hear a reference does not mean that an aggrieved party is shut off from contending subsequently that the tribunal has acted without or in excess of jurisdiction when making its award. The decision of the Federal Court in the first appeal is not intended and is no authority for the proposition that once a reference is made by the Minister, say under section 20(3), conferring the Industrial Court jurisdiction to enter into an inquiry over a dispute, such jurisdiction must be taken to include a decision that the aggrieved party is a "workman" within the meaning of the Act. It may well be and probably it can even be taken for granted that the Minister in exercising his discretion to make a reference merely assumes that the aggrieved party is a "workman" since the question whether a person is a "workman" under the Act is one of mixed law and fact which can only be properly determined after due inquiry by the Industrial Court depending on the circumstances of each case. Although the first appeal involved an order of prohibition whilst the second appeal was concerned with an order of *certiorari,* the same principle applies in determining whether the Industrial Court had committed a jurisdiction error.

In the present appeal we are only concerned with an alleged error of jurisdiction in hearing the reference on its merits. This is the jurisdiction in the wider sense referred to earlier. The only issue to be determined is whether the issuance of a notice of strike constitutes a "strike" within the meaning of section 10(1) of the Act. If the answer is in the negative, then that would be the end of this appeal. But if it is in the positive, then the Industrial Court had committed an error of law, and in that event a second issue would arise as to whether such error of law forming the basis of the award would render the award a nullity due to the Industrial Court acting in excess of jurisdiction. Before the 1980 amendment, the word "strike" was defined as follows:

"In this Act, *unless the context otherwise requires* 'strike' means the cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal or a refusal under a common understanding of a number of persons who are or who have been so employed to continue to work or to accept employment, and includes

any act or omission by a body of worker employed in any industry acting in combination or under a common understanding, *which is intended to* or does result in any limitation or restriction or cessation of or dilatoriness in the performance or execution of the whole or any part of the duties connected with their employment."

In our judgment, although the relevant definition of "strike" as stated above means, *inter alia*, the cessation of work by a body of persons acting in combination and includes any act by such body of workmen *which is intended to* or does *result in any cessation in the performance or execution of duties connected with their employment*, such interpretation need not apply where "the context otherwise requires" in the Act. Section 10 is a special section dealing with prohibition of certain acts by workmen and employers pending recognition of a trade union. It seems to us that the word "strike" in section 10(1) should not include notice of strike. The context of section 10(1) requires that the prohibition intended must be actual strike and not merely an intention to strike. It would be absurd that the legislature would prohibit mere intention to strike on the part of workmen just as it would be so, if mere intention to dismiss a workman under section 10(2) would be a prohibition against the employer. The legislative intent must be that what is prohibited pending recognition of a trade union is actual strike by the workmen and actual dismissal of a workman by the employer. It would therefore follow that section 45 cannot apply unless the workers had actually gone on strike. It cannot render the issuance of strike notice as equivalent to an illegal strike, nor can it constitute a disciplinary ground under the proviso to section 10(2). Further, the strike notice dated February 11, 1980 was issued in Form A under regulation 3 Industrial Relations (Notice of Strikes and Lock-outs) Regulations 1967 (PU 370/67 as amended by PU 525/67) which must refer to Part IX on "Trade Disputes, Strikes and Lock-outs *etc.*" and not Part III which governs "Recognition of Trade Unions" – the subject matter with which we are really concerned in this appeal. Such Form A notice need only be sent by persons employed in a public utility service before they can legally go on strike. Thus regulation 3(1) provides:

"The notice of strike referred to in sub-section (1) of section 40 (the present section 43) of the Act shall be substantially in Form A in the Schedule to these Regulations and shall be signed by not less than seven workmen concerned in the trade dispute, or where the workmen concerned in the trade dispute are members of a trade union, by the President or the Secretary and two other officers of such trade union."

Under section 43(1) such notice need only be sent by workmen in any essential service as enumerated in the schedule to the Act to which none of the thirty-eight workers belongs. The impugned strike notice was therefore misconceived and has no legal effect, and this is another ground for holding that such notice cannot constitute a strike within the meaning of section 10(1) and therefore cannot constitute a disciplinary ground for dismissing the workers allowable under the proviso to section 10(2). In law and in fact the workers had never gone on strike as envisaged by section 10(2) and as such they cannot be dismissed on disciplinary ground under the proviso until the issue of recognition of the union is resolved. In the circumstances, the Industrial Court and the High Court though on erroneous ground, were correct in law in their conclusion that the word "strike" for the purpose of section 10(1) does not include issuance of a notice of strike. The Industrial Court in basing its award on that valid conclusion had not therefore committed any error of law and as such it cannot be said to have exceeded its jurisdiction. The learned Judge was accordingly correct in rejecting the Motion.

There remains a final point which we need refer to and this concerns the view expressed by the learned Judge in his judgment to the effect that the High Court could interfere with the award of the Industrial Court only if the tribunal had committed error of jurisdiction as distinct from error of law. As such he was of the view that if there had been an error of law in this particular case, it would have been an error by misinterpretation within jurisdiction and accordingly the application to quash the award must be dismissed. We assume this view of the learned Judge is based on the principle enunciated by the Privy Council in *South East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturers Employees Union*[6] as contained in the following passages:

"The decision of the House of Lords in *Anisminic Ltd.* v. *Foreign Compensation Commission* shows that, when words in a statute oust the power of the High Court to review decision of an inferior tribunal by certiorari, they must be construed strictly, and that they will not have the effect of ousting that power if the inferior tribunal has acted without jurisdiction or 'if it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity' (per Lord Reid at p. 171). But if the inferior tribunal has merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as breach of the rules of natural justice, then the ouster will be effective. In *Pearlman* v. *Harrow School*, Lord Denning M.R. suggested that the distinction between an error of law which affected jurisdiction and one which did not should now be 'discarded'. Their Lordships do not accept that

suggestion. They consider that the law was correctly applied to the circumstances of that case in the dissenting opinion of Geoffrey Lane L.J., as he then was, when he said (at p. 74):

'. . . the only circumstances in which this court can correct what is to my mind the error of the [county court] judge is if he was acting in excess of his jurisdiction as opposed to merely making an error of law in his judgment by misinterpreting the meaning of 'structural alteration . . . or addition'."

Since then, legal opinion in England, particularly that of the House of Lords has not stood still. The suggestion of Lord Denning to discard the distinction between an error of law which affects jurisdiction and one which does not and thereby widening the scope of *certiorari* notwithstanding the existence of an ouster clause has gained momentum. Thus in *In re Racal Communications Ltd.*[7] Lord Diplock at page 187 made the following statement:-

"The break-through made by *Anisminic* was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished. Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or of adminstrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity."

Later in *O'Reilly* v. *Mackman,*[8] Lord Diplock again said the same thing.

We have not failed to note that in *Fire Bricks*[5] case, the Privy Council had held that in considering the effect of section 29(3) (a), which is the forerunner of section 33B(1), two questions should be separately considered.

"The first question is whether the paragraph has any application to certiorari, so as to oust it, or whether it merely prohibits appeals. If it does apply to certiorari, the second question is whether, notwithstanding the ouster, certiorari is still available to correct an error on the face of the record."

In that case in holding that an error of law by misinterpretation did not constitute acting in excess of jurisdiction and therefore *certiorari* was ousted by section 19(3)(a) of the Industrial Relations Act, the Board had found support from the provision of section 53A which strongly indicated that Parliament intended to exclude *certiorari.* On section 53A, Lord Fraser delivering the judgment of the Board had this to say at page 168:

"The section is unusual in thus making the opinion of the Attorney-General on a question of law effectively binding on the Industrial Court. It seems to be intended to keep questions which have been remitted to the Industrial Court away from the ordinary courts; otherwise it would have followed the more usual pattern of directing the court to state a case for the opinion of the High Court. It would be inconsistent with that intention that an award of the Industrial Court, giving effect to the Attorney-General's opinion, should be liable to be quashed by the High Court for an error of law on its face. The reason for keeping questions remitted to the Industrial Court away from the ordinary courts may be that its functions are not purely judicial. For example, the Industrial Court is directed by section 27(4) of the Act of 1967, in making its award in respect of a trade dispute, to have regard to *inter alia* "the financial implications and the effect of such award on the economy of the country, and on the industry concerned' and by subsection (5) to 'act according to equity, good conscience and the substantial merit of the case without regard to technicalities and legal form'. Whatever the policy underlying section 53A, it provides strong reinforcement for the view that awards of the Industrial Court are not subject to review by certiorari merely on the ground of error of law."

With the complete deletion of section 53A (renumbered section 57) from the Act with effect from May 30, 1980 by Act A484 and the introduction of a new section 33A, reference on question of law has been taken from the Attorney-General and moved back to the High Court. It would seem to us that the transfer exercise by the legislature indicates a clear intention to limit the severity of the ouster clause on the remedy of *certiorari.* It may also indicate the intention of the legislature to curtail the full impact of the Privy Council decision. Perhaps the time will come for this Court to consider the view expressed by Lord Diplock in the House of Lords in *Re Racal Communications Ltd.* and thereby open the way for the acceptance of Lord Denning's suggestion in *Pearlman* v. *Harrow School* in discarding the distinction between an error of law which affected jurisdiction and one which did not. There is no degree of nullity and if there is an error of law on which the Industrial Court's award depends, the remedy of *certiorari* should not be excluded by section 33B(1). In other words, if there is an error of law on which the award of the Industrial Court is founded, such error whether of interpretation or otherwise must necessarily be without jurisdiction or in excess of jurisdiction. Any decision in any award based on an invalid interpretation or construction of the law must surely be a nullity, and this must be construed as a nullity resulting from the Industrial Court doing or failing "to do something in the course of the inquiry which is of such a nature that its decision is a nullity" as referred to by Lord Reid at page 171 in *Anisminic's* case, or the Court 'having asked themselves the wrong question" as referred to be Lord Diplock at page 187 in *In re Racal Communications Ltd.*

For reasons already stated earlier, we hold that the learned trial Judge was correct in dismissing the Motion. The appeal is accordingly dismissed with costs. Deposit to the first respondent to account for taxed costs.

Appeal dismissed.

Solicitors : *Skrine & Co.; K. Chandra & Co.*

NG YEE FONG & ANOR. v. E.W. TALALLA

[S.C. (Salleh Abas L.P., Seah & Mohamed Azmi S.C.JJ.) May 23 & June 28, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 230 of 1984]

Equity – Encroachment on land – Application for mandatory injunction to remove encroachment – Equitable estoppel – Estoppel by acquiescence – Discretion – Laches.

Land Law – Encroachment on land – Right of proprietor – Injunction – National Land Code, ss. 340 & 341.

In this case the respondent had applied for and obtained a mandatory injunction to remove the septic tank and fence which formed part of the appellants' premises but which had been constructed on the respondent's land. The appellant appealed. It was contended that the septic tank and the other encroachment had a right to be on the land and as such the defence of equitable estoppel would apply.

Held: (1) a proprietor who establishes a proprietary right is *ex debito justitiae* entitled to an injunction unless it can be said against him that he has raised such an equity that it is no longer open to him to assert his legal or proprietary title;

(2) in the circumstances of this case no equity had in fact been raised against the respondent. From the evidence the appellants had not satisfied any of the requisite elements so as to enable them to raise the defence of equitable estoppel;

(3) in this case the damage was not trivial in nature and could not be remedied by compensation in damages. The encroachment particularly the septic tank adversely interfered with the use of the respondent of his land for the purpose of building a dwelling house. As such the learned judge had properly exercised his discretion to grant the injunctions.

(4) in the circumstances of this case the respondent cannot possibly be held to be guilty of laches so as to disentitle him from the remedy of injunction which he sought.

Cases referred to:

(1) *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] K.B 130.
(2) *De Bussche* v. *Alt* (1878) 8 Ch. D. 286, 314.
(3) *Armstrong* v. *Sheppard & Short Ltd.* [1959] 2 All E.R. 651.

SUPREME COURT.

Miss G. Ambiavagar for the appellants.
T. Ariarajah for the respondent.

Cur. Adv. Vult.

Mohamed Azmi S.C.J. (delivering the Judgment of the Court) : This is an appeal against the judgment of Wan Hamzah J. (as he then was) wherein he granted the following orders with costs in favour of the respondent:

(i) that the Defendants should forthwith cease from encroaching into the Plaintiff's land and resite their fencing in accordance with the boundary as shown in the title;

(ii) that the Defendants should remove their septic tank from the Plaintiff's land;

(iii) that the Defendants should refrain whether by themselves or their servants or agents or otherwise from doing the following acts or any of them that is to say erecting or re-erecting buildings on their land in such a manner as to encroach onto the Plaintiff's land.

The learned Judge also dismissed the appellants' counterclaim for mandatory injunction pertaining to a garage built by the respondent against which there is no appeal.

From the pleadings, the respondent's cause of action was based on trespass to land – the dispute being one of encroachment of respondent's land. However, from the respondent's Amended Statement of Claim, it was his case that the trespass, *i.e.*, the construction of the septic tank and fence was not carried out by the appellants but by their predecessors-in-title. As such he did not pray for damages for trespass but merely for the removal by the appellants of the encroachment from his land. It should therefore be noted at the outset that the dispute was not on the construction of the encroachment but rather on the right of the respondent as the sole registered proprietor of lot 179 to have the septic tank and fence (which formed part of the appellants' premises) removed from the land by mandatory injunction. As a matter of law, it cannot be disputed that a proprietor who establishes a proprietary right is *ex debito justitiae* entitled to an injunction unless it